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In the
Supreme Court of the United States

OCTOBER TERM, 1959

No. 805

CROWN ZELLERBACH CORPORATION
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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STATE OF WASHINGTON, *Appellee*.
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

Appellant appeals from the Washington Supreme Court's September 16, 1958, judgment and submits that this court has appeal jurisdiction and that a substantial constitutional question is presented.

OPINION BELOW

The Washington Supreme Court opinion (not yet reported officially) is reported unofficially at 152 Wash. Dec. 688 and at 328 P.2d 884 and is appended as Appendix A. The trial court's opinion is unreported and is appended as Appendix B.

JURISDICTION

This suit was brought under RCW 82.32.160 and .180[1] to recover taxes levied pursuant to Washington

[1]Revised Code of Washington, cited RCW. See *infra*, p. 3; Appendix D, p. 37.

statutes, the validity of which appellant challenged as repugnant to the commerce clause of the Federal constitution (Art. I, §8). The judgment sought to be reviewed upheld the validity of the statutes. It is dated and was entered September 16, 1958. It is appended as Appendix C. Notice of appeal was filed in Washington's Supreme Court December 3, 1958. Time for docketing was extended through April 1, 1959. 28 U.S.C. §1257(2) is believed to confer appeal jurisdiction on this court. *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359 (1954); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389 (1952); *Freeman v. Hewit,* 329 U.S. 249 (1946); *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1938); *Puget Sound Stevedoring Co. v. Tax Commission,* 302 U.S. 90 (1937); *Fisher's Blend Station v. Tax Commission,* 279 U.S. 650 (1936).

STATUTES INVOLVED

All statutes involved are cited below and are set out verbatim in Appendix D.

Sections of **Ch. 180, Laws of Washington, 1935,** pp. 709 *et seq.,* as amended, challenged as unconstitutional but upheld by Washington's Supreme Court are:

> **Sections 4, 4(b) and 4(e),** pp. 709-10, last amended prior to audit period by sections 1, 1(b) and 1(c), Ch. 5, Laws of Washington, 1950-51 (Ex. Sess. 31st Legis. 1950), pp. 7-8; codified as RCW 82.04.220, .240 and .270, respectively. Appendix D, p. 35.
>
> **Section 5(f),** p. 712, last amended prior to audit

period by section 2(f), Ch. 228, Laws of Washington, 1949, p. 819; codified as RCW 82.04.070. Appendix D, p. 36.

Section 6, p. 715, last amended prior to audit period by section 1 (part), Ch. 9, Laws of Washington, 1950-51 (Ex. Sess. 32d Legis. 1951), p. 112; codified as RCW 82.04.440. Appendix D, p. 36.

Sections of **Ch. 180, Laws of Washington, 1935,** pp. 709-20, 837-39, as amended, involved, are:

Section 8, last amended prior to audit period by section 5, Ch. 178, Laws of Washington, 1941, p. 489; codified as RCW 82.04.460. Appendix D, p. 37.

Section 12(f), p. 720, last amended prior to audit period by section 3, subpart (f), Ch. 249, Laws of Washington, 1944-45 (Reg. Sess. 29th Legis. 1945), p. 741; codified as RCW 82.04.430(6). Appendix D, p. 37.

Section 199, p. 837, the relevant parts of which were last amended prior to audit period by section 29, Ch. 225, Laws of 1939, p. 1013, and by section 12, Ch. 9, Laws of Washington, 1950-51 (Ex. Sess. 32d Legis. 1951), p. 28; codified as RCW 82.32.160 and .180, respectively. Appendix D, p. 37.

Rule 112. There is also involved Rule 112, Rules Relating to The Revenue Act of the State of Washington, issued by the Excise Tax Division of the Tax Commission of the State of Washington. Appendix D, p. 40.

QUESTION PRESENTED

Does the commerce clause preclude Washington from levying a manufacturing privilege tax measured exclusively by the proceeds of interstate sales of taxpayer's Washington-manufactured products when:

1. Taxpayer's Washington manufacturing operations are not exclusively local but are a part of an interstate business complex characterized by the following factors, among others: (a) Extra-Washington and interstate executive and administrative control of taxpayer's Washington manufacturing; (b) extra-Washington and interstate advertising, sales promotion and credit control of Washington-manufactured products; (c) final Washington manufacturing of products theretofore partially manufactured in other states; and (d) partial manufacture in Washington of products thereafter further processed out of state and then stocked there by taxpayer for sale, all of which factors add value increment to Washington-manufactured products sold in interstate commerce.

2. The tax is unapportioned as between taxpayer's exclusively local manufacturing activities and its extra-Washington activities which contribute value to Washington-manufactured products sold in interstate commerce.

3. Taxpayer already has paid, without challenge, business privilege taxes measured by the gross proceeds of the sale of all of its Washington-manufactured products sold in Washington.

4. Taxpayer proved all data essential to a fair and equitable apportionment.

STATEMENT

Description of Proceedings

Taxpayer began this action pursuant to RCW 82.32.160 (Appendix D, p. 37) by filing with the Tax

Commission a Petition for Hearing and Correction of Amount of Assessment for this audit period. The Petition was heard May 17, 1955, and on July 11, 1955, the Commission issued its Order denying the petition for refund (Tr. 11, 12). Taxpayer then filed, pursuant to RCW 82.32.180 (Appendix D, p. 37), Notice of Appeal to the Superior Court (Tr. 1-3). The state answered and taxpayer replied (Tr. 5-14). The matter came on for Superior Court trial *de novo* June 26, 1956. The trial court entered his Memorandum Decision on December 13, 1956 (Appendix B) and Findings of Fact, Conclusions of Law and Judgment dismissing taxpayer's action on May 6, 1957 (Tr. 15-22). On June 4, 1957, taxpayer timely served and filed Notice of Appeal to Washington's Supreme Court, together with Bond for Costs on Appeal (Tr. 22-23). After briefs were served and filed and oral arguments were had, Washington's Supreme Court on August 14, 1958, filed its opinion affirming the trial court (Tr. 25-31). Judgment was entered accordingly on September 16, 1958 (Tr. 32; Appendix C, *infra*). Notice of Appeal to this court was timely served and filed with the Clerk of Washington Supreme Court December 3, 1958 (Tr. 33-34). On January 7, 1959, the Chief Justice of Washington's Supreme Court entered Order Enlarging Time for Docketing to and including April 1, 1959 (Supp. Tr. 1).

Stage of Proceedings at Which Constitutional Questions Sought To Be Reviewed Were Raised

The validity of the Washington statutes levying this tax was first challenged in Washington's courts in an-

other action by this taxpayer in 1954.[2] In 1954, as here, taxpayer contended that the manufacturing privilege tax on its interstate commerce was repugnant to the commerce clause unless properly apportioned. The Washington Supreme Court's 1954 opinion was understood to mean that the federal commerce clause required apportionment but that the court declined to so decide the case because taxpayer had failed to prove that the measure of the tax included taxpayer's interstate commerce. Taxpayer then brought this action to supply, with respect to a subsequent period (January 1, 1952 through February 28, 1954, hereinafter called "the audit period"), the proof it lacked in the 1954 case. (See trial court's memorandum opinion, Appendix B, p. 29).

With respect to this audit period, the validity of the statutes levying the unapportioned privilege tax was first challenged in taxpayer's first Petition for Hearing and Correction of Amount of Assessment of Tax filed with the Tax Commission March 3, 1955. Taxpayer alleged therein that the tax statutes were invalid under the commerce clause unless the tax was apportioned. The Commission's July 11, 1955, Order denying refund acknowledged this as taxpayer's principal contention but held that apportionment is not required (Tr. 12).[3]

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[2] *Crown Zellerbach Corporation v. State*, 45 Wn.2d 749, 278 P.2d 305 (hereinafter called "the 1954 case"). The 1954 case involved this same taxpayer and the same tax statutes, but a different taxing period and different proof.

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[3] That portion of the Order entitled "Taxpayer's Contentions" reads: "Taxpayer's claim for refund is based on a formula apportioning certain of its manufacturing activities conducted entirely within this state to nontaxable interstate commerce. It contends that the Supreme Court's decision in the above noted case [the 1954 case, see fn. 2, *supra*] re-

Taxpayer's Notice of Appeal of the Commission's Order to the Superior Court (opening pleading) alleged that the Commission erred in holding that apportionment was not required by the commerce clause (Tr. 3, para. VI). The state's answer placed this allegation in issue (Tr. 7, para. V). It was the principal subject of trial briefs, oral argument (Tr. 21) and the trial court's memorandum opinion (Appendix B). Conclusion of Law II was that the commerce clause does not require apportionment.[4] Accordingly, the complaint was dismissed (Tr. 21).

The commerce clause repugnancy of the unapportioned business privilege tax on interstate commerce was the principal issue presented to Washington's Supreme Court which upheld the validity of the taxing statutes. Relevant portions of the opinion are quoted in the margin.[5]

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quires apportionment of its taxable gross income from local manufacturing activities according to a ratio which its total cost of doing business within the state bears to its total cost of doing business both within and without the state."

---

[4]Conclusion II, Tr. 20, reads: "The commerce clause of the Federal constitution does not prohibit the state from imposing an excise tax upon local manufacturing activity measured by the value of the product as determined by the proceeds from the sale of such manufactured goods though sold outside the taxing state where transportation costs to point of out-of-state delivery are deducted from such proceeds."

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[5]"* * * appellant contends that the state of Washington is prohibited from measuring its tax upon the total receipts from the sale of Crown's manufactured goods by the commerce clause (Art. I, §8) * * * of the Federal constitution. * * *

" * * *

"Appellant next contends that since the activities of its San Francisco office are reflected in the ultimate sales price of the product, the state of Washington is prohibited from measuring its tax upon the total receipts from the sale of its (Crown's) manufactured goods by Art. I, §8, * * * of the United States constitution. * * *

" * * *

Character of Taxpayer's Business

During the audit period taxpayer, a Nevada corporation, was qualified and registered in Washington where it has pulp and paper mills and offices. It manufactured pulp and paper products in Washington and elsewhere; it wholesaled in Washington products which it manufactured in Washington and elsewhere; it wholesaled its Washington-manufactured products in Washington and elsewhere. During the audit period taxpayer exercised two Washington-taxable business privileges relevant here:

1. The privilege of wholesaling in Washington its Washington-manufactured products and its products manufactured extra-Washington (taxable under RCW 82.04.270, Appendix D, p. 35).

2. The privilege of manufacturing in Washington (taxable under RCW 82.04.240, Appendix D, p. 35), including the following transactions relevant here: (a) Manufacturing in Washington its products theretofore partially manufactured extra-Washington; (b) manufacturing in Washington products thereafter wholesaled extra-Washington; and (c) partial manufacturing in Washington of products thereafter further processed by taxpayer out of state and then stocked there for sale.

"We conclude that the tax imposed on 'manufacturing' does not merit an apportionment merely because a portion of the executive function of directing the manufacturing activity is carried on from outside this state.

" • • •

"We conclude that the manufacturing tax imposed herein does not violate either of the Federal constitution provisions cited.

" • • •

"The judgment is affirmed."

The Tax Strikes Exclusively at Taxpayer's Interstate Commerce

Taxpayer contends that the unapportioned manufacturing privilege tax, levied here, is an unconstitutional burden on interstate commerce. Taxpayer makes no contention regarding the wholesaling privilege tax except as it is involved in apportionment discussed in the following section. However, knowledge of the measure of the wholesaling privilege tax and the Commission's administration of the two privilege taxes is essential to understanding taxpayer's contention.

The following figures illustrate how the Tax Commission levied the two privilege taxes and how the manufacturing privilege tax burdened taxpayer's interstate commerce. During a fiscal year, stipulated to be fairly representative (Tr. 18, Finding VIII), within the audit period taxpayer manufactured in Washington products worth $73.75 million. Washington-manufactured products worth $13.75 million comprised a part of the $20.5 million of taxpayer's products wholesaled in Washington on which taxpayer reported and paid the wholesaling privilege tax. Accordingly, the measure of the manufacturing privilege tax became $60 million ($73.75—$13.75=$60.00).[6] All remaining Washington-manufactured products, worth said $60 million, were sold exclusively in interstate commerce. It is the unapportioned manufacturing privilege tax measured exclusively by the value of products sold exclusively in interstate commerce that taxpayer challenges.

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[6]This was according to RCW 82.04.440, Appendix D, p. 36; *Crown Zellerbach Corporation v. State*, 45 Wn.2d 749, 287 P.2d 305 (1954); and the opinion sought to be reviewed. Appendix A, p. 19.

Apportionment

The combined manufacturing and wholesaling privilege taxes paid by taxpayer were measured by total gross selling price (less transportation cost and discount) and were not apportioned as between taxpayer's local activities, on the one hand, and its extrastate and interstate activities, on the other hand.

Taxpayer proved below that the value of its Washington-manufactured products, irrespective of where sold, and of its Washington wholesaled products, irrespective of where manufactured, was attributable to an integrated interstate business complex (Tr. 15-19); that its San Francisco headquarters office, controlling important features of its Washington manufacturing and wholesaling operations, increased the value of its Washington-manufactured products and Washington-wholesaled products (Tr. 18-19, para. IX); and that partial processing in other states contributed to the value of products finally manufactured and wholesaled in Washington (Tr. 19, para. X).

Taxpayer also proved that the ratio between appellant's Washington costs and the total cost of its entire integrated interstate business complex is 43 per cent (Tr. 17, para. VII). This percentage, applied to the gross proceeds of taxpayer's total sales everywhere, determines that portion of taxpayer's total nation-wide sales attributable to its Washington business activities. So computed, the combined tax on taxpayer's exercise of the privileges of manufacturing and wholesaling in Washington would have been about $475,000 instead of the $625,000 paid for the audit period.

The $150,000 sought to be recovered accurately measures the amount by which Washington's unapportioned business privilege taxes unconstitutionally burdened taxpayer's exclusively interstate commerce during the audit period.

THE QUESTION IS SUBSTANTIAL

There are no technical jurisdictional issues requiring consideration, all requirements of 28 U.S.C. §1257 (2) having been met.

The grounds upon which it is contended that the federal question is substantial for jurisdictional purposes are the same grounds upon which it is contended that the issue is substantial enough to merit the court's plenary consideration. Therefore the discussions will be merged.

The gist of this appeal is that the state court erred on the constitutional issue. This, in itself, is of substantial importance. Granted plenary consideration, appellant will specify the errors. For the purpose of this statement, it must suffice to say that the decision is premised upon an irrelevant circumstance, *viz.*, that the incident sought to be taxed was purely local manufacturing. This claimed distinction is not a distinction at all and has no significance insofar as the practical operative effect of the tax is concerned.[7]

[7] The court distinguished decisions relied upon by appellant on the ground that there " • • • the incident sought to be taxed was either an integral part of interstate commerce or was not purely a local activity. • • • " Instead, the state court relied principally on *American Manufacturing Co. v. St. Louis*, 250 U.S. 459 (1919), because " • • • manufacturing, is purely a local activity and, hence, properly taxable. • • • " This is not a distinction at all. Taxpayer conceded in its opening brief: "However, appellant concedes that it is engaged in a local activity sufficient to subject it to the state's jurisdiction to tax. Its manufacturing opera-

The issue presented does not involve the "taxed incident." It involves the measure of the tax, apportionment and its practical operative effect on interstate commerce.[8] By this means, the court decided this case, involving the maximum permissible measure of a business privilege tax, by reliance on *American Manufacturing Co.* (1918) where neither the measure nor apportionment of the tax was put in issue.[9] By this means the state court avoided discussion of decisions of this court which, according to *Williams v. Stockham Valves & Fittings, Inc.,* No. 33, October Term 1958, are relevant here.[10]

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tions, for example, constitute such an activity. * * * The existence of the local activity therefore furnishes the condition prerequisite to making interstate commerce pay its way. * * * "

[8] This is not a question of whether the state can tax, but how much. It is not a question of whether the manufacturing privilege tax can be measured by gross receipts, but whether the measure can reach gross receipts attributable to extrastate and interstate activity. It is a question of ascertainable apportionment.

[9] In *American Manufacturing Co.*, the taxpayer claimed that it could not be taxed at all. Taxpayer here claims responsibility for paying its fair share of tax. It questions only the measure of the tax when it is unapportioned and, therefore, reaches a quantum of gross proceeds attributable to taxpayer's extrastate and interstate activities.

[10] It is beyond dispute that a state may not lay a tax on the privilege of engaging in interstate commerce, *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951) and that without apportionment as to local activity, state taxes on interstate commerce are invalid. *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 314 (1938); *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938); and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 427 (1946). A state may not impose a tax which discriminates against interstate commerce by subjecting it to the burden of "multiple taxation," *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954), and *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938). Such impositions have been stricken down because the commerce clause precludes what was described in *Freeman v. Hewit* as "one single-tax-worth of direct interference with the free flow of commerce." *Williams v. Stockham Valves & Fittings, Inc.*, No. 33, October Term 1958. All but the latter, recent case were cited to Washington Supreme Court but it declined to follow them.

The Washington Supreme Court may determine for itself the operating incident of the tax, but it cannot preclude this court from determining whether the measure of the tax does or does not burden interstate commerce.[11]

The practical effect of this tax impedes the free flow of trade between states. The incident taxed (Washington manufacturing) is not coterminous with the measure of the tax. The repugnancy is that Washington compels taxpayers to pay it for the privilege of doing interstate business there without reducing the measure of the tax by the ascertainable value added by extrastate and interstate activity. This results in multiple taxation, clearly demonstrable here, which the commerce clause was designed to prevent.[12]

The importance of the constitutional question is not

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[11] *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 391-92 (1952). In such determinations labels are not important and it is the duty of this court to determine the practical operation of the tax. *Galveston H. & S. A. R. Co. v. Texas*, 210 U.S. 217, 227 (1908); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443 (1940); and *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, 363 (1954), in which a fairly apportioned privilege tax on gross receipts was declared unconstitutional.

[12] It must suffice for this statement to offer by way of illustration the following. Taxpayer buys waste wood in British Columbia which it manufactures there into chips suitable for pulping; ships them to Washington for pulping and manufacture into paper; ships the paper to Oregon where it is waxed; and ships the waxed paper to California where it is processed, packaged and distributed for wholesale in Arizona and elsewhere. During the entire process taxpayer's San Francisco headquarters office adds value through its control of all such operations. Privilege taxes measured by unapportioned gross receipts levied in each succeeding state reaches value attributable to the states preceding it in the progress from raw material to consumer product. Washington taxes value added by British Columbia and the headquarters office, Oregon taxes Washington and British Columbia values and so forth.

properly measured only by the claimed constitutional wrong or only by the $150,000 tax refund sought here. This tax burden on interstate commerce has substantial long-range cost consequences to Washington taxpayers in integrated interstate commerce and, similarly, to the state, its revenue authorities and its citizens.

This taxpayer owns and manages forests in Washington and elsewhere from which it expects a perpetual wood source for its Washington mills. With substantial capital at risk, it plans Washington business activities for at least 75 years. It expects to be a responsible corporate citizen of that state. It subscribes to the principle that the founders did not intend to immunize interstate commerce from carrying a measure of the costs of state government equivalent to the business privilege derived therefrom.[13] The question is: When the extrastate and interstate value-increment is ascertainable, does not the commerce clause preclude the state from taxing it?

Like most western states, Washington's population is increasing rapidly with attendant demands for increased state services without complementary revenue increases from the newcomers.

On numerous occasions this court has observed pressures for social services which constrain states to make revenue invasions into interstate commerce.[14] At the

[13] *Williams v. Stockham Valves & Fittings, Inc.*, No. 33, October Term 1958; and *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 75-76 (1946), citing many cases.

[14] *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48, 59 (1940); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 75 (1946); *Freeman v. Hewit*, 329 U.S. 249, 252 *et seq.* (1946); and *Williams v. Stockham Valves & Fittings, Inc.*, No. 33, October Term 1958.

same time it is familiar history that the commerce clause was conceived in the founder's failure to restrain state taxation which impaired the Confederation's interstate and foreign commerce and contributed to the demise of that government. Again, the question is: When the extrastate and interstate value-increment is ascertainable, does not the commerce clause preclude the state from taxing it?

Historically, Washington has persisted in exploiting its business privilege tax beyond the limitation permitted by the commerce clause. On what is believed to be the only occasions that this court has given plenary consideration to appeals challenging Washington's privilege taxes, this court three times has declared unconstitutional each of the three challenged unapportioned taxes.[15] Following the 1938 case, Washington's legislature passed what is now RCW 82.04.460 (Appendix D, p. 37), compelling apportionment of the service privilege tax. Excepting this single concession, Washington has persisted in measuring the business privilege tax by the unapportioned gross proceeds, some

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[15] *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650 (1935), struck down tax on privilege of radio broadcasting in Washington (taxpayer's stations located exclusively in Washington) where measure of tax was unapportioned gross income, including income from interstate commerce. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), struck down tax on privilege of loading and unloading vessels in foreign commerce (taxpayer's services performed exclusively in Washington) where measure of tax was gross income from foreign and interstate commerce. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1938), struck down tax on privilege of brokering Washington-grown fruit (taxpayer's office and agents located in Washington) where the measure of tax was taxpayer's gross income unapportioned to intrastate activity.

of which are attributable to the taxpayer's extrastate and interstate activity.

Appellant submits that this tax, invalidated with respect to services in *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434 (1938) and arising out of the same revenue act, is substantially identical in its practical operation to the tax challenged here. The issue has long range importance to those risking capital in integrated interstate commercial enterprise doing business in Washington (and in other states) and to Washington revenue authorities so substantial as to require plenary consideration by this court.

In the past the line has been a vague one drawn on an *ad hoc* basis between the measure of a valid state tax and the measure of a tax on an extra state or interstate activity exempted by the commerce clause. This case offers opportunity to be specific because the proof here establishes precisely the measure of the intra-state activity, on the one hand, and the extra-state and interstate activity, on the other. The more acute the demand for state revenue becomes and the more complex becomes our integrated interstate business, the greater will be the need for identifying "firm peaks of decision which remain unquestioned" and to clear up the "tangled underbrush of past cases."

This chapter is at least as important as the chapter on which plenary consideration was afforded in the three cited Washington cases of 1936-38. The need for plenary consideration is at least as compelling in this area of privilege taxes, measured by extra and inter-state ac-

tivity, as it was with respect to the net income tax cases decided by this court in the October 1958 term.

Respectfully submitted

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APPENDIX A

OPINION OF WASHINGTON SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CROWN ZELLERBACH CORPORATION, *Appellant*, vs. THE STATE OF WASHINGTON, *Respondent*.	No. 34422 *En Banc* Filed August 14, 1958

This is an action by Crown Zellerbach Corporation (hereinafter referred to as Crown) to obtain a tax refund. Under Washington's business and occupation tax law, Crown is engaged in two taxable activities, (1) as a wholesaler selling pulp and paper to customers within the state, and (2) as a manufacturer of pulp and paper products. It is stipulated that, during the year in question, goods of the value of $6,728,745 (which were manufactured out of state), and goods of the value of $13,753,578 (which were manufactured or stocked within the state), were wholesaled by Crown to Washington customers, and that, during the same period, Crown manufactured and sold goods of the value of $60,021,192 (cost of transportation and discounts excluded) to customers outside the state. Crown paid the tax on these amounts, as computed by the tax commission, and instituted this proceeding for a refund. The relief prayed for was denied by the trial court, and Crown has appealed.

Appellant concedes that the physical manufacturing activity of Crown is completely effected within the State of Washington. However, appellant contends that

the State of Washington is prohibited from measuring its tax upon the total receipts from the sale of Crown's manufactured goods by the commerce clause (Art. I, § 8) and the privileges and immunities clause (amendment 14, § 1), of the Federal constitution. It argues that, since its headquarters office in California directs its manufacturing activities in this state, a portion of the cost of maintaining this activity carried on outside the state must be deducted from the gross sales price, in order to conform with the cited constitutional provisions.

Are the executive functions being carried on outside the state by Crown a part of the activity upon which the manufacturing tax is imposed?

The following statutory provisions are pertinent:

RCW 82.04.070: " 'Gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses."

RCW 82.04.220: "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

RCW 82.04.240: "Upon every person except persons taxable under subsection (2) of RCW

82.04.260 engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one per cent.

"The measure of the tax is the value of the products, including byproducts, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state."

Since the statute (RCW 82.04.120) does not define "To manufacture" to include executive functions, the word "manufacture" must be given its plain and ordinary meaning. *Pacific Northwest Alloys v. State,* 49 Wn.(2d) 702, 306 P.(2d) 197 (1957); *Miller v. Pasco,* 50 Wn.(2d) 229, 310 P.(2d) 863 (1957).

To "manufacture" is defined in Webster's New International Dictionary (2d ed.) as follows:

"To make (wares or other products) by hand, by machinery, or by other agency; . . .

"To work, as raw or partly wrought materials, into suitable forms for use; . . .

"To fabricate; to invent; also, to produce mechanically."

It is the local activity of converting raw materials into a finished product (manufacturing) which is taxed. RCW 82.04.070, *supra,* excludes any deduction from the gross proceeds of sales for the cost of property sold, the cost of materials used, labor costs, and so forth.

We conclude that the tax imposed on "manufacturing" does not merit an apportionment merely because a portion of the executive function of directing the

manufacturing activity is carried on from outside this state.

Appellant next contends that, since the activities of its San Francisco office are reflected in the ultimate sales price of the product, the State of Washington is prohibited from measuring its tax upon the total receipts from the sale of its (Crown's) manufactured goods by Art. I, § 8, and amendment 14, § 1, of the United States constitution. Appellant has cited, in support of its contention, cases wherein the incident sought to be taxed was either an integral part of interstate commerce or was not purely a local activity. See *Fisher's Blend Station v. State Tax Commission*, 297 U.S. 650, 80 L.Ed. 956, 56 S.Ct. 608 (1936); *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307, 82 L.Ed. 1365, 58 S.Ct. 913, 117 A.L.R. 429 (1938).

However, in the case presently before us, the incident upon which the tax is imposed, that is, manufacturing, is purely a local activity and, hence, properly taxable. *American Manufacturing Co. v. St. Louis*, 250 U.S. 459, 63 L.Ed. 1084, 39 S.Ct. 522 (1919); *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 76 L.Ed. 1038, 52 S.Ct. 548 (1932); *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 81 L.Ed. 1193, 57 S.Ct. 772, 112 A.L.R. 293 (1937); *Department of Treasury of Indiana v. Ingram-Richardson Manufacturing Co.*, 313 U.S. 252, 85 L.Ed. 1313, 61 S.Ct. 866 (1941).

A review of the Federal cases concerned with the power of a state to tax a purely local activity, measured by the gross receipts from sales of the product within and outside the taxing state, reveals that such taxes

have been upheld, where the local taxable incident is one of sufficient substance so that the sales price substantially reflects the value of the products at the place of manufacture. *Home Insurance Co. v. New York*, 134 U.S. 594, 33 L.Ed. 1025, 10 S.Ct. 593 (1890); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L.Ed. 823, 58 S.Ct. 546, 115 A.L.R. 944 (1938); *Department of Treasury of Indiana v. Wood Preserving Corp.*, 313 U.S. 62, 85 L.Ed. 1188, 61 S.Ct. 885 (1941); *Aponaug Manufacturing Co. v. Stone*, 314 U.S. 577, 86 L.Ed. 467, 62 S.Ct. 131 (1941); *International Harvester Co. v. Department of Treasury of Indiana*, 322 U.S. 340, 88 L.Ed. 1313, 64 S.Ct. 1019 (1944); *Nippert v. Richmond*, 327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586, 162 A.L.R. 844 (1946).

In *American Manufacturing Co. v. St. Louis, supra*, the court, in considering a similar tax, said:

". . . No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State, or of the city acting under its authority, to impose a license tax in the nature of an excise upon the

conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes. (Citing cases.)

"The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market. . . .

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law."

The commerce clause is designed to prevent a burden upon interstate commerce by duplication of tax upon a single activity. *Western Live Stock v. Bureau of Revenue, supra; Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 82 L.Ed. 1043, 58 S.Ct. 736

(1938); *International Harvester Co. v. Department of Treasury of Indiana, supra.* The possibility of a duplicate tax is not here present, for the reason that the entire taxable incident, that is, manufacturing, is conducted solely within the State of Washington. In such instances, the United States supreme court has upheld the tax, although measured by gross receipts received partly from out-of-state sales. See *Western Live Stock v. Bureau of Revenue, supra; Coverdale v. Arkansas-Louisiana Pipe Line Co., supra; International Harvester Co. v. Department of Treasury of Indiana, supra; International Harvester Co. v. Evatt,* 329 U.S. 416, 91 L.Ed. 390, 67 S.Ct. 444 (1947); *Interstate Oil Pipe Line Co. v. Stone,* 337 U.S. 662, 93 L.Ed. 1613, 69 S.Ct. 1264 (1949).

We conclude that the manufacturing tax imposed herein does not violate either of the Federal constitutional provisions cited.

Appellant next contends that, since its sales-promotion activities carried on outside the state are reflected in the gross sales price of commodities sold within this state, an apportionment of the wholesale tax is required by the cited constitutional provisions.

A similar apportionment in regard to the taxation of a wholesale activity totally effected within this state was refused in *United States Steel Corp. v. State,* 151 Wash. Dec. 200, 202, 316 P.(2d) 1099 (1957), in which opinion we said:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local whole-

sales and retail activities. No part of the tax is attributable to its manufacturing or other out-of-state activities. The sales are negotiated within the State of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of Illinois,* 340 U.S. 534, 95 L.Ed. 517, 71 S.Ct. 377; *Field Enterprises v. State, supra* (47 Wn.(2d) 852, 289 P.(2d) 1010 (affirmed, 352 U.S. 806, 1 L.Ed.(2d) 39, 77 S.Ct. 55))."

We adhere to the rule announced in the cited case.

Under the facts of the instant case, the interstate commerce provisions of our Federal constitution are not violated, for the reason that the wholesale activity (the taxable incident) is completely accomplished within the taxing jurisdiction. The fact that the commodity has been or will be in interstate commerce does not preclude a tax on the purely local wholesale activity. *United States Steel Corp. v. State, supra; Henneford v. Silas Mason Co.,* 300 U.S. 577, 81 L.Ed. 814, 57 S.Ct. 524 (1937).

There remains the single question of whether the imposition of the tax violates Art. I, § 12, of the state constitution.

We adhere to the decision of this court in *Crown Zellerbach Corp. v. State,* 45 Wn.(2d) 749, 278 P.(2d) 305 (1954), in which the question was answered adversely to appellant. Appellant cites this decision in support of its contention that apportionment is proper under the facts of the instant case.

We do not agree that the cited case so holds because (1) the issue here presented was not before the court

in that case, and (2) the apportionment referred to therein concerns activities which are substantially a part of the taxable incident, rather than those activities which enhance only the measure of the tax.

The judgment is affirmed.

OTT, J.

We concur:
Hill, C. J.
Mallery, J.
Donworth, J.
Finley, J.
Rosellini, J.
Weaver, J.
Hunter, J.

APPENDIX B

TRIAL COURT'S OPINION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

CROWN ZELLERBACH CORPORATION,
Plaintiff,
vs.
THE STATE OF WASHINGTON,
Defendant.
No. 28775

MEMORANDUM OPINION

Plaintiff seeks refund of Business and Occupation taxes paid. It is stipulated that the court may take judicial notice of the file of this court in its cause numbered 26683, which resulted in the appeal determined in 45 Wn.(2d) 749. Exercising such judicial notice, it is pointed out that the findings in number 26683 were that (Finding IV), "The reports of the auditor of the Washington State Tax Commission which were attached to and made part of plaintiff's petition to said Tax Commission, which is attached hereto as a part hereof, are factually correct. Only the legal conclusions to be drawn therefrom are here in contest." It is further pointed out that the last sentence of Finding V reads as follows: "Thus, plaintiff contests only the manufacturing or extracting tax asserted on goods sold out of state but manufactured or extracted within this state." With the exception of different periods of tax payment, and with the further exception of the plaintiff's proof concerning apportionment of gross revenues to Washington in the ratio Washington costs

bear to total costs in the case at bar, the basic facts in number 26683 and in the case at bar are the same.

In the case at bar plaintiff has again been taxed on the basis of an activity purely local, and the measure applied is the value of products as determined by the gross proceeds of sales. In the prior case, manufacturing and extracting were held to be activities not in interstate commerce (45 Wn.(2d) 749, 759).

Plaintiff relies upon certain language in the opinion last cited commencing at page 760, and argues therefrom that apportionment is required in the case at bar. We cannot agree. It seems that fundamentally plaintiff's objection is addressed to classification, and that has been answered in the last sentence of the prior opinion (p. 765) which reads as follows: "We conclude that the classification made by RCW 82.04.440 is reasonable, and hence does not contravene either the state or Federal constitutions."

The proposed apportionment involves the very things which the decisions prohibit. The computation begins with the total sales of plaintiff everywhere, and the total cost of doing business everywhere. By the assignment of certain costs, and the apportionment of other costs not capable of assignment, a cost of doing business in Washington is developed. The Washington cost so computed is 43.234 per cent. of the cost of doing business everywhere. This per cent. of total sales of plaintiff everywhere is then apportioned to Washington, and such apportionment is then used as the measure of the tax, and the resultant claim for refund. The net result is the substitution of a computed amount, for an actual

amount as reported by the taxpayer and audited by the state.

It is unnecessary to consider the statute of limitations, and the effect of stipulations in the prior action. The defendant will prevail.

Dated this 13th day of December, 1956.

RAYMOND W. CLIFFORD, *Judge*

APPENDIX C

JUDGMENT SOUGHT TO BE REVIEWED

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CROWN ZELLERBACH CORPORATION, *Appellant,* vs. THE STATE OF WASHINGTON, *Respondent.*	Tuesday, September 16, 1958 No. 34422	Thurston County No. 28775

JUDGMENT

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 16th day of September, A.D. 1958, on motion of John J. O'Connell, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said Crown Zellerbach Corporation, and from the American Surety Company of New York, surety, the costs of this action taxed and allowed at Two hundred thirty-two and 17/100 ($232.17) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

Of record in Journal 43
at page 112 in the
Office of the Clerk of
the Supreme Court

APPENDIX D

STATUTES INVOLVED

RCW 82.04.220, .240 and .270

Sections 4, 4(b) and 4(e), Ch. 180, Laws of Washington, 1935, pp. 709-10, last amended prior to audit period by sections 1(b) and 1(c), Ch. 5, Laws of Washington, 1950-51 (Ex. Sess. 31st Legislature, 1950), pp. 7-8; codified as RCW 82.04.220, 82.04.240 and 82.04.270, respectively:

"Section 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: [RCW 82.04.220]

"(a) * * *

"(b) Upon every person except persons taxable under paragraph (2) of subsection (d) below engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products manufactured, multiplied by the rate of one-quarter of one per cent;

"The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state; [RCW 82.04.240]

"(c) * * *

"(d) (1) * * *

"(d) (2) * * *

"(e) Upon every person except persons taxable under subsection (d) (1) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sale of such business multiplied by the rate of one-quarter of one per cent; [RCW 82.04.270]

"(f) * * *

"(g) * * *."

RCW 82.04.070

Section 5(f), Ch. 180, Laws of Washington, 1935, p. 711, last amended prior to audit period by sec. 2(f), Ch. 228, Laws of 1949, p. 819; codified as RCW 82.04.070:

"(f) The term 'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property * * * without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;".

RCW 82.04.440

Section 6, Ch. 180, Laws of Washington, 1935, p. 715, last amended prior to audit period by sec. 1 (part), Ch. 9, Laws of Washington, 1950-51 (Ex. Sess. 32d Legislature, 1951), p. 12; codified as RCW 82.04.440:

"Every person engaged in activities which are within the purview of the provisions of two or more of sections 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided,* That persons taxable under 82.04.250 or 82.04.270 shall not be taxable under 82.04.230, 82.04.240, or paragraph (2)

of 82.04.260 with respect to extracting or manufacturing of the products so sold * * *."

RCW 82.04.460

Section 8, Ch. 180, Laws of Washington, 1935, last amended prior to audit period by section 5, Ch. 178, Laws of Washington, 1941, p. 489; codified as RCW 82.04.460:

"Section 8. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this title, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state."

RCW 82.04.430

Section 12(f), Ch. 180, Laws of Washington, 1935, p. 720, last amended prior to audit period by sec. 3, subpart (f), Ch. 249, Laws of Washington, 1944-45 (Reg. Sess. 29th Legislature, 1945), p. 741; codified as RCW 82.04.430:

"(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;".

RCW 82.32.160 and .180

Section 199, Ch. 180, Laws of Washington, 1935, pp. 837-39, the relevant parts of which were last amended prior to audit period by sec. 29, Ch. 225, Laws of 1939,

p. 1013, and by sec. 12, Ch. 9, Laws of Washington, 1950-51 (Ex. Sess. 32d Legislature, 1951), p. 28; codified as RCW 82.32.160 and 82.32.180, respectively:

"Section 199. Any person having been issued a notice of additional taxes, delinquent taxes, interest or penalties assessed by the Tax Commission under the provisions of this act, may within twenty days after the issuance of the original notice of the amount thereof petition the Tax Commission in writing for a hearing and correction of the amount of such assessment. The petition shall set forth the reasons why such hearing should be granted and the amount of the tax, interest or penalties, which the petitioner believes to be due. The Tax Commission shall promptly grant such hearing and shall fix the time and place therefor and notify the petitioner thereof by mail. If no such petition be filed within such twenty day period the assessment covered by such notice shall become final." [RCW 82.32.160]

"Any person, except one who has failed to keep and preserve books, records, and invoices as required in this chapter and chapter 82.24, having paid any tax as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston County, within the time limitation for a refund provided in this chapter, or within thirty days after the date of the notice denying a hearing, or within thirty days after the date of the order provided in the preceding section. In the appeal the taxpayer shall set forth the amount of the tax imposed upon him which he concedes to be the correct tax and the reason why the tax should be reduced or abated. The appeal shall be perfected by serving a copy of the notice of appeal upon the

tax commission within the time herein specified and by filing the original thereof with proof of service with the clerk of the superior court of Thurston County. Within ten days after filing notice of appeal, the taxpayer shall file with the clerk of the superior court a good and sufficient surety bond payable to the state in the sum of two hundred dollars, conditioned to diligently prosecute the appeal and pay the state all costs that may be awarded if the appeal of the taxpayer is not sustained.

"The trial in the superior court on the appeal shall be *de novo* and without the necessity of any pleadings other than the notice of appeal. The burden shall rest upon the taxpayer to prove that the tax as paid by him is incorrect, either in whole or in part, and to establish the correct amount of the tax. In such proceeding the taxpayer shall be deemed the plaintiff, and the state, the defendant; and both parties shall be entitled to subpoena the attendance of witnesses as in other civil actions and to produce evidence that is competent, relevant, and material to determine the correct amount of the tax that should be paid by the taxpayer. Either party shall be allowed to appeal to the supreme court in the same manner as other civil actions are appealed to that court.

"It shall not be necessary for the taxpayer to protest against the payment of any tax or to make any demand to have the same refunded or to petition the commission for a hearing in order to appeal to the superior court, but no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided." [RCW 82.32-.180]

Rule 112

Rule 112, Rules Relating to the Revenue Act of the State of Washington, issued by the Excise Tax Division of the Tax Commission of the State of Washington:

"Rule 112. The term 'value of products,' includes the value of by-products, and except as provided herein, shall be determined by 'gross proceeds of sales' whether such sales are at wholesale or at retail, to which shall be added all subsidies and bonuses received with respect to the extraction, manufacture, or sale thereof.

" 'The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property * * * without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.' (Sec. 5(f) of the law, 82.04.070, RCW)

"In the Case of Bona Fide Sales of Products — The law provides (in Sec. 7, 82.04.450, RCW), that under the 'Extracting' and 'Manufacturing' classifications of the Business and Occupation Tax the value of products extracted or manufactured shall be determined by the gross proceeds of sales in every instance in which a bona fide sale of such products is made, and whether sold at wholesale or at retail.

"Sales to Points Outside the State—In determining the value of products delivered to points outside the state there may be deducted from the gross proceeds of sales so much thereof as the taxpayer can show to be actual transportation costs from the

point at which the shipment originates to the point of delivery outside the state.

"All Other Cases—The law provides that where products extracted or manufactured are

(1) For commercial or industrial use (by the extractor or manufacturer—See Rule 134); or

(2) Transported out of the state, or to another person without prior sale; or

(3) Sold under circumstances such that the stated gross proceeds from the sale are not indicative of the true value of the subject matter of the sale;

the value shall correspond as nearly as possible to the gross proceeds from other sales at comparable locations in this state of similar products of like quality and character, and in similar quantities by the taxpayer or others, and shall include subsidies and bonuses.

"In the absence of sales of similar products as a guide to value, such value may be determined upon a cost basis. In such cases, there shall be included every item of cost attributable to the particular article or articles extracted or manufactured, plus the cost of transportation to place of use within this state."